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(PETITIONER)

PETITION BEFORE THE CALIFORNIA STATES WATER RESOURCES BOARD

OFFICE OF THE CHIEF COUNSEL

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Regional Water Quality Control Board

San Francisco Bay Region

(RESPONDENT)

PETITION OF ADMINISTRATIVE AND CIVIL LIABILITY OF ORDER NO. R2-2008-0084 ISSUED BY
THE SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD ON DR. COLLIN
MBANUGO FOR LEONA HEIGHTS SULPHUR MINE, OAKLAND, CALIFORNIA

1. This is a petition against the San Francisco regional water quality control board (SFRWQCB), administrative civil liability (ACL) imposed on me the petitioner, Dr. Collin Mbanugo of the above stated address, to the State Water Board in accordance with California Water Code, Section 13220.
2. A \$200,000 Administrative civil liability (ACL) was imposed by the Regional Water Quality Control Board (RWQCB), San Francisco Bay Area on me, the petitioner for failure to submit monthly progress report timely in violation of

3. Section 13267 of the California Water Code (CWC). The ACL is attached in Exhibit I.
4. The SFRWQCB imposed the ACL on September 10, 2008.
5. The action of SFRWQCB was improper for the following reasons:
 - a. There was no Section 13267 order issued by the SFRWQCB on me solely and/or disclosed to me to-date as the current owner of a property with pre-existing cleanup and abatement order (CAO: 98-004) with several other active discharger (See Exhibit II).
 - b. Although the SFRWQCB indicated in a letter dated December 16, 2005 to me and other dischargers named in the updated CAO (2003-0028), their requirement for submittal of monthly progress report pursuant to Section 13267, this requirement conflicted with the relevant CAO referred to in that same December 16, 2006 which was issued pursuant to Section 13304 of the California Water Code and not Section 13267 (see Exhibits III and IV).
 - c. That if a Section 13267 requirement was imposed on me solely, exclusive of other dischargers who are jointly and severally liable for the site cleanup by the SFRWQCB by their December 16, 2005 requirement, no such information was disclosed to me prior to and following the issuance of the 13267 requirement. As such my rights to due process would have had to be violated in order for the RWQCB to make such a drastic change to the liable dischargers.
 - d. That the SFRWQCB was selective in the prosecution of me solely amongst several named discharger for violation of Section 13267 on two grounds: (1) Selective prosecution of violations for failure to submit monthly progress report under Section 13267, instead of Section 13304 of the CWC, which explicitly required monthly progress report in Section B6 of the applicable CAO (98-004) and failure to prosecute all discharges for violations to comply with CAO for the site (see Exhibit V) despite the fact those CAO violations are more severe and compliance with the violations are protective of the waters of the state of California and pre-date violations of failure to file monthly reports timely. (2) Selective prosecution of me solely instead of all dischargers of Section 13267 violations without due notice to me of a status change in the responsible parties by the SFRWQCB from jointly and severally to solely responsible for the monthly progress report.

- e. That the spirit and/or the letter of the law of the California Land and Reuse and Revitalization act of 2004 (AB 389) is being violated by the RWQCB if I, an innocent buyer and landowner of a contaminated site with pre-existing CAO and a volunteer discharger added to the list of discharger in the CAO strictly because I became the new owner of an existing contaminated site became solely liable for compliance with RWQCB orders and requirements which are severally and jointly liable for all dischargers.
 - f. That the SFRWQCB mis-applied the CWC Section 13267 to the timely monthly report violation, whereas Section 13267 is explicitly for technical reports requirements and not monthly progress report. However, monthly progress reports are explicitly required in the relevant CAO 98-004 in Section B6 for the site in compliance with Section 13304 of the CWC.
 - g. That the SFRWQCB mis-represented the facts of the status of the dischargers at the September 10 2008 hearing in its testimony to the Board (see Exhibit VI: Transcript of hearing of September 10th 2008) that I was the only surviving dischargers that can be legally served, hence the prosecution of me solely as the violator of Section 13267. This is not true, there are other surviving dischargers who are well known to and acknowledged by the SFRWQCB (see Exhibit VII).
 - h. That the SFRWQCB prevented new evidence to be presented by me the Petitioner at the September 10 2008 hearing about my financial ability including exculpatory evidence that became known to me only after August 11, 2008.
 - i. That the RWQCB fine of \$200,000 for failure to submit progress report not technical monitoring report of discharges to the waters of the state as contemplated in the Section 13267 of CWC) is excessive and not proportional to the damages the late monthly progress report could have caused, especially since there are violations of cleanup and abatement orders since 1992 (see exhibit VIII) for the site that is still to be complied with, which if complied with will protect the waters of the State of California.
6. The Petitioner is aggrieved for the following reasons:
- a. The penalty is a huge financial burden imposed on me and I do not have the capacity to pay such a fine and diverts limited resources from remediation of the site.
 - b. The selective prosecution of me, an innocent current owner of an abandoned mine site with prior on-going violations of failure to comply with the 98-004 CAO, which pre-dates my purchase of the site in year 2001, is diverting my limited resources towards un-necessary legal cost

to defend myself because of the RWQCB failure to: 1. follow due process in the issuance of a Section 13267 CWC requirements, 2. misapplication of the relevant section of the CWC for violation of failure to submit monthly progress report timely under Section 13267 instead of 13304, and 3. the presumption of guilt rather than innocence until proven guilty in their prosecution of me solely as the only discharger without notice for the failure to submit monthly report timely.

- c. It is a violation of my civil rights and rights to due process and protection from unjust prosecution.
- d. It has caused other named dischargers to stall and renege on a remediation agreement to fund compliance with the CAO and the monthly report submittal which the RWQCB was previed to in 2003 (Exhibit IX). Consequently, the violation of failure to submit monthly progress report timely occurred because the financial resources to pay for the reports were not available from the primary intended sources, other dischargers in the CAO and my limited financial capacity.

7. The petitioner is requesting that the Water Board take the following action:

That I am requesting evidentiary hearing to present arguments and evidence, points and authority and explanations of arguments that have not been adequately presented.

That the 13267 violation penalty is deemed improper, hence should be reversed and no penalty be imposed on me, solely for any improperly constituted Section 13267 violation.

That if the Water Board finds there was a proper 13267 violation, the violation must be corrected to comply with due process of notification and/or include all dischargers for the site and named in the CAO and/or the penalty adjusted downward for failure to submit monthly report, which are not technical reports and proportional to the damages due to late filing of monthly progress reports.

That I be recognized and granted the status of a volunteer discharger by the State Water Board and not be held liable hereafter for any failure to comply with the CAO or any other RWQCB requirements for this site.

8. POINTS AND AUTHORITY (Including Citations to Docs and hearing transcript).

Points and authority or argument will be submitted soonest after legal arguments are prepared by Petitioners soon-to-be-appointed legal counsel.

LIST OF EXHIBITS

EXHIBIT I: SFRWQCB Order No. R2-2008-0084 for Administrative Civil Liability for Leona Heights Sulphur Mine, Oakland on Dr. Collin Mbanugo on September 10, 2008

Exhibit II: CAO for Leona Height Sulphur mine site CAO 98-004

Exhibit III: Section 3267 requirement letter from SFRWQCB of December 16, 2008

Exhibit IV: Updated CAO for Leona Heights mine site CAO2003-0028.

Exhibit V: Violation of old CAO letter from SFRWQCB to Alcoa and other Dischargers January 30, 1998.

Exhibit VI: Transcript of the September 10, 2008 Hearing

Exhibit VII: RWQCB letter of October 7, 2008 responding to your September 19th letter

Exhibit VIII: Old CAO 92-105

Exhibit IX: Letter from RWQCB to acknowledging remediation agreement, May 2003.

9. I declare under penalty of perjury in accordance with the laws of the State of California that a copy of this petition has been sent to the SFRWQCB by

putting a copy in the US mail to both the: Legal Counsel Dorothy Dickey, Esq. and the Executive Officer Bruce H. Wolfe, Regional Water Quality control Board, San Francisco Bay Area, 1515 Clay Street, Suite 1400, Oakland, California 94612, this day, October 9, 2008.

10. That the issues raised in this petition were presented to the SFRWQCB on September 10 2008. Any issue not raised at the September 10 2008 hearing and presented in this petition were prevented from being introduced at the hearing by Counsel of the RWCB on grounds that August 11 2008 was the deadline for me to submit my objections to the SFRWQCB proposed ACL, regardless of the fact, that facts that became known to me after August 11, 2008 are allowed on the rule of evidence in a court of law in California.

Signed Collin A. Mbanugo, MD.

Dr. Collin Mbanugo, Petitioner

Dated October 9th 2008.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

ORDER NO. R2-2008-0084

ADMINISTRATIVE CIVIL LIABILITY FOR:

**DR. COLLIN MBANUGO, Owner
THE LEONA HEIGHTS SULFUR MINE
OAKLAND, ALAMEDA COUNTY**

The California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter the "Water Board"), finds with respect to Dr. Collin Mbanugo (hereinafter the "Discharger") that:

1. Dr. Mbanugo is the current owner of the Leona Heights Sulfur Mine, a two-acre abandoned mining site located in the Oakland Hills near the junction of Interstate 580 and State Highway 13 (hereinafter the "Site").
2. Water quality at the site is impacted by acid mine runoff, which discharges into a creek that flows through waste rock piles left behind when the mine was abandoned in the late 1920s. Flows passing through the site follow a natural drainage channel of several hundred feet and then enter a storm drain. The storm drain discharges to Lake Aliso on the Mills College Campus, and ultimately discharges to San Leandro Bay via another storm drain system.
3. Site remediation was required initially under Cleanup and Abatement Order No. 98-004, which this Board adopted on January 30, 1998. The Discharger purchased the property on November 29, 2001. The Board amended the 1998 Order on April 14, 2003 by adopting Order No. R2-2003-0028 (hereafter the "CAO"), which identified Dr. Mbanugo as the current owner and added him to the list of dischargers of the Site.
4. On December 16, 2005, the Executive Officer sent a letter to the Discharger pursuant to Water Code Section 13267. The letter approved a revised scope of work and schedule that had been proposed by the Discharger in a work plan submitted pursuant to the CAO on October 28, 2005. The letter required the Discharger to submit monthly progress reports documenting work completed on the project. The progress reports were to be submitted by the last day of each month, beginning in December 2005. Submittal of progress reports was to continue until the Discharger had fully complied with the requirements of the CAO.
5. The Section 13267 letter approved a revised implementation schedule, but required the submittal of monthly progress reports because the Discharger previously had not been diligent in completing tasks required for compliance with

the CAO. Prior work had been intermittent with a history of missed deadlines, resulting in the issuance of a Notice of Violation from Water Board staff on October 6, 2005. The progress reports were required as a means to substantiate the Discharger's compliance with the CAO.

6. The Discharger has not complied with the December 16, 2005 letter because he stopped submitting the required monthly progress reports. Furthermore, the Discharger has not completed project tasks according to the schedule that was approved in the letter. Monthly progress reports were received from the Discharger in January, February, April, May, September, October, and November of 2006, and in February and May of 2007. No further reports have been received since May 2007.
7. Two additional Notices of Violation were issued to the Discharger on March 10, 2006 and July 17, 2006, in an attempt to gain compliance with the December 16, 2005 letter.
8. On July 9, 2008, the Assistant Executive Officer issued an Administrative Civil Liability Complaint in the amount of \$200,000 for the Discharger's failure to submit monthly progress reports required in the Section 13267 letter issued December 16, 2005. For violating CWC Section 13267, the Water Board may administratively impose civil liability pursuant to CWC Section 13268(a)(1) and (b)(1) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
9. The maximum civil liability that could be imposed for this matter is calculated based on the number of days the required technical reports are overdue. For all of the reports missing as of the date the Administrative Civil Liability Complaint was issued (June 10, 2008) there are 2,508 days of violation. (The report due on May 31, 2007 is 376 days late; the report due on June 30, 2007 is 346 days late; the report due on July 31, 2007 is 315 days late; the report due on August 31, 2007 is 284 days late; the report due on September 30, 2007 is 254 days late; the report due on October 31, 2007 is 223 days late; the report due on November 30, 2007 is 193 days late; the report due on December 31, 2007 is 162 days late; the report due on January 31, 2008 is 131 days late; the report due on February 29, 2008 is 102 days late; the report due on March 31, 2008 is 71 days late; the report due on April 30, 2008 is 41 days late; and the report due on May 31, 2008 is 10 days late.) Since the ACL Complaint was issued, there have been an additional 92 days of violation for each of these 13 late reports (1,196 days of violation). The Discharger has also failed to submit the report due on June 30, 2008, which is now 72 days late and for July 31, which is now 41 days late. Accordingly, there are a total of 3,817 days of late report violations, for which the Water Board could assess a total liability of \$3,817,000.
10. On July 9, 2008, the Assistant Executive Officer proposed that civil liability should be imposed on the Discharger in the amount of \$200,000 for the violations

11. The Water Board, after hearing all testimony and reviewing the exhibits and information in the record, determined the Discharger is subject to civil penalties. In determining the amount of civil liability to be assessed to the Discharger under CWC Section 13268, the Water Board has taken into consideration the factors described in CWC Section 13327.

12. With respect to the factors the Water Board has taken into consideration under CWC Section 13327, it finds as follows:

a. Nature, Circumstances, Extent and Gravity of the Violations:

Compliance with the December 16, 2005 request for technical reports under CWC Section 13267 is necessary so that Water Board staff can monitor the Discharger's progress and efforts toward compliance with the CAO. Failure to provide those reports deprives the Water Board of information related to the Discharger's progress in complying with the CAO. The progress reports are an integral part of the CAO compliance. Failure to submit the reports is reflective of the Discharger's failure to comply with the scope of work and schedule approved in the December 16, 2005 letter. The failure to comply with the approved scope of work has allowed an ongoing discharge of low pH water contaminated with metals into waters of the State to continue unabated. Because the reporting violations deprived the Water Board of the opportunity to monitor the Discharger's progress towards protecting water quality, the nature, circumstances, extent and gravity of the reporting violations in this instance are very serious, and the Water Board's analysis of this factor weighs in favor of assessing a substantial penalty.

b. Susceptibility of the Discharge to Cleanup:

The discharges from the mine can be cleaned up by means of implementation of a corrective action plan submitted by the Discharger, which was approved by Water Board staff on July 5, 2006. However, because this ACL Complaint seeks penalties for failure to submit reports under CWC 13267, this factor is not applicable to the Water Board's analysis of an appropriate penalty amount for this violation, except to the extent the failure to submit reports has deprived the Water Board of its opportunities to protect water quality, as discussed under Subdivision a, above.

c. Degree of Toxicity of the Discharge:

The waste rock at the site contains elevated concentrations of sulfur and metals such as iron, lead, copper, and arsenic. The waste rock piles are more

porous than the native bedrock. This allows water to migrate easily through the material. Contact between water and the sulfur-rich waste rock, primarily during the rainy season, causes sulfur to be dissolved, promoting the formation of sulfuric acid within the waste rock piles. Discharge of acidic water from the waste rock pile, known as acid mine runoff, is indicated at the site by the characteristic yellow coloration in the streambed. Creek sampling has shown very acidic conditions in the creek, with the pH at time dropping below 3. The low pH, in turn, increases the solubility of metals present in the waste rock, resulting in high metals concentrations in the creek. Water quality in the creek is impacted visually and chemically for a considerable distance downstream from the site. This water is toxic to aquatic species living in the creek at the site and downstream of the discharge. Beneficial uses of the creek and other water bodies downstream from the site are seriously compromised as a direct result of the discharge. However, because this ACL Complaint seeks penalties for failure to submit reports under CWC 13267, this factor is not applicable to the Water Board's analysis of an appropriate penalty amount for this violation, except to the extent the failure to submit reports has deprived the Water Board of opportunities to protect water quality from toxic discharges, as discussed under subdivision a, above.

d. Ability to Pay and Ability to Continue in Business:

The Discharger owns a number of properties located in Oakland and Emeryville. Although some of the properties are undeveloped, they are zoned for residential development. The assessed value of those properties (which may not reflect their market value, which is likely higher) is in excess of \$1.5 million. The property owner has not provided any evidence of inability to pay. The Water Board's analysis of this factor does not indicate that there should be a reduction in the proposed penalty.

e. Voluntary Cleanup Efforts Undertaken:

The discharger has not voluntarily undertaken cleanup activities. The Discharger is required under the CAO to implement corrective actions. The Water Board's analysis of the factor does not indicate that there should be a reduction in the proposed penalty.

f. Prior History of Violations:

Water Board staff has issued three Notices of Violation ("NOV") to the Discharger in an attempt to gain compliance with the December 16, 2005 letter and the CAO. These NOV letters were issued on October 6, 2005; March 10, 2006; and July 17, 2006. The Water Board's analysis of this factor supports imposition of a substantial penalty because of the need for progressive enforcement, as outlined in the State Water Resources Control Board's February 2002, Water Quality Enforcement Policy.

g. Degree of Culpability:

The Discharger is solely responsible for submission of monthly progress reports to demonstrate compliance with the 13267 letter and the CAO. The Discharger has not submitted a progress report since May 2007 despite numerous requests by Water Board staff that he comply, and despite his written representation that he would do so. The Water Board's analysis of this factor supports imposition of a substantial penalty.

h. Economic Savings:

The Discharger has achieved modest economic savings by not preparing and submitting the technical reports required under CWC Section 13267. The Discharger has achieved significantly greater economic savings by not performing the corrective actions required to comply with the Section 13267 letter and the CAO. The Water Board's analysis of this factor supports the imposition of a substantial penalty.

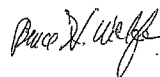
i. Other Matters As Justice May Require:

The Discharger's property is a significant source of pollutants to the environment. The toxicity of the pollutants emanating from the property has impacted beneficial uses downstream, including the inability to sustain aquatic life. Although he initially demonstrated cooperation after purchasing the property, the Discharger has terminated efforts to obtain necessary permits and has cut off communication with the Water Board staff by failing to submit the required reports. The Discharger has not implemented any corrective actions to comply with the CAO for more than four years or to comply with the December 16, 2005 letter requiring progress reports for more than a year. The Discharger's willful refusal to comply with the Water Board's duly-issued CAO and reporting requirements continues to allow the prolonged discharge of harmful and toxic material into the environment. The Water Board's analysis of the factor supports the imposition of a substantial penalty.

13. A \$200,000 civil penalty is appropriate based on the specific findings made in Finding No. 12.
14. This action is an Order to enforce the laws and regulations administered by the Water Board. Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with Section 15321(a)(2), Title 14, of the California Code of Regulations.
15. The Discharger may petition the State Board to review this Action. The State Board must receive the petition within 30 days of the date this order was adopted by the Water Board. The petition will be limited to raising only the substantive issues or objections that were raised before the Water Board at the public hearing or in a timely submitted written correspondence delivered to the Water Board.

IT IS HEREBY ORDERED that Dr. Colin Mbanugo is civilly liable for the violations of the 13267 Order set forth in detail above, and shall pay the administrative civil liability in the amount of \$200,000. The liability shall be paid to the State Water Pollution Cleanup and Abatement Account within 30 days of the date of this Order.

I, Bruce H. Wolfe, Executive Officer, do hereby certify that the foregoing is a full, complete, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on September 10, 2008.



Digitally signed
by Bruce Wolfe
Date: 2008.09.15
11:12:50 -07'00'

Bruce H. Wolfe
Executive Officer